Tan Kian Hoe v Poh Kian Chong

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NO L-11–3 OF 2007
ABDUL RAHMAN SEBLI JC
3 NOVEMBER 2008

Evidence — Adverse inference — Failure to call witness — Assault and battery — Victim's wife intervened during assault — Wife not called to testify — Whether adverse inference could be drawn against her

Evidence — Witness — Corroboration — Assault and battery — Victim's wife intervened during assault — Wife not called to testify — Whether adverse inference could be drawn against her — Whether assault and battery established without her evidence — Whether magistrate erred in assessment of facts

Evidence — Witness — Witness lied on some matters — Whether relevant to present case — Whether magistrate correct in discrediting witness due to previous lie

Tort — Damages — Assault and battery — Appeal — Dismissal of plaintiff's application for damages — Whether magistrate failed to consider relevant evidence — Whether appellate court should interfere with finding of facts

The plaintiff/appellant, who managed a coffee shop, was assaulted and beaten by the defendant/respondent outside his shop. The statement of the plaintiff was that he discovered that the tyre of his car parked behind his shop was punctured. The space where he had parked his car was meant for taxis. When he inquired about the puncture, the defendant inflicted on the plaintiff, serious injuries including injury to his right eye. PW2, the medical officer who attended to the plaintiff, confirmed the injuries sustained by the plaintiff. The plaintiff's evidence was corroborated by PW6, his employee. The defendant had ceased beating the plaintiff only when the plaintiff's wife stepped in and stopped the defendant. The plaintiff's wife was however, not called to give evidence. The learned magistrate dismissed the plaintiff's application for damages against the defendant for assault and battery on the ground that the evidence adduced by the plaintiff was insufficient to establish his claim. The learned magistrate had drawn an adverse inference against the plaintiff for not calling his wife to testify; the fact that PW6 had failed to

mention anything about the role played by the plaintiff's wife and also that her admission during the cross examination that she had lied to the immigration authorities regarding her age in the passport convinced the magistrate that she must have lied to the court to keep her job and is therefore is not a witness of truth. Hence this appeal by the plaintiff.

Held, allowing the appeal with costs:

(1) On a preponderance of probabilities a case of assault and battery had been made out by the plaintiff even without the evidence of his wife. The fact that the plaintiff had sustained injuries during the incident was corroborated by medical evidence and further, the plaintiff's evidence that the injury was caused by the defendant was corroborated by PW6 (see para 9).

(2) The learned magistrate misconstrued the plaintiff's evidence. What the plaintiff said was that the defendant had stopped beating him when his wife came in between them. The plaintiff did not say that that was the only reason why the defendant stopped attacking him. In any case whether or not the beating only stopped after the plaintiff's wife intervened was really a non-issue. The real issue was whether the defendant assaulted the plaintiff causing the injuries. The court must not be unduly concerned with trivial or worse, non-issues (see para 12).

(3) The learned magistrate had not even referred to the medical evidence, let alone deal with it. It appears that he was more interested in what was not before him rather than what he had before him. Other than finding that the plaintiff did suffer some injuries, the learned magistrate did not make any other finding of fact. Clearly it was his duty to judicially consider and evaluate all the relevant evidence and make his findings thereon. His failure to do so warrants appellate intervention (see para 18).

(4) PW6's lie to the immigration authorities in the past had no relevance to the issues before the learned magistrate. In any case, there was no evidence that the lie had anything to do with her employment with the plaintiff. The evidence should have been disregarded for being irrelevant and whose prejudicial effect outweighed its probative value (see para 9).

[Bahasa Malaysia summary

Plaintif/perayu yang menguruskan kedai kopi, diserang dan dipukul oleh defendan/responden di luar kedainya. Kenyataan oleh plaintif adalah bahawa dia mendapati bahawa tayar keretanya yang diletakkan di belakang kedainya, dipancitkan. Tempat di mana dia meletakkan keretanya adalah dikhaskan

untuk teksi. Apabila dia menanyakan tentang tayarnya yang pancit, defendan telah memukul plaintif, menyebabkan kecederaan yang serius termasuk kecederaan kepada mata kanannya. PW2, pegawai perubatan yang merawat plaintif, mengesahkan kecederaan yang dialami oleh plaintif. Keterangan plaintif disokong oleh PW6, pekerjanya. Defendan berhenti memukul plaintif hanya apabila isteri plaintif campur tangan dan menghalang defendan. Isteri plaintif, walau bagaimanapun, tidak dipanggil untuk memberikan keterangan. Majistret yang bijaksana menolak permohonan plaintif untuk ganti rugi terhadap defendan untuk serangan dan serang sentuh atas alasan bahawa keterangan yang dikemukakan oleh plaintif tidak mencukupi untuk membuktikan tuntutannya. Majistret yang bijaksana membuat anggapan bertentangan terhadap plaintif kerana tidak memanggil isterinya untuk memberi keterangan; fakta bahawa PW6 gagal menyatakan apa-apa mengenai peranan yang dimainkan oleh isteri plaintif dan juga bahawa pengakuannya semasa pemeriksaan balas bahawa dia telah menipu pihak berkuasa imigresen mengenai umurnya di dalam pasport meyakinkan majistret bahawa dia mesti telah menipu mahkamah untuk mengekalkan kerjanya dan oleh itu bukan saksi yang boleh dipercayai. Maka rayuan ini oleh plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kemungkinan besar kes serangan dan serang sentuh telah dibuktikan oleh plaintif walaupun tanpa keterangan isterinya. Fakta bahawa plaintif telah mengalami kecederaan semasa kejadian disokong oleh keterangan perubatan dan selanjutnya, keterangan plaintif bahawa kecederaan telah diakibatkan oleh defendan adalah disokong oleh PW6 (lihat perenggan 9).

(2) Majistret yang bijaksana tersalah tanggap keterangan plaintif. Apa yang plaintif katakan adalah bahawa defendan telah berhenti memukulnya apabila isterinya datang meleraikan mereka. Plaintif tidak menyatakan bahawa ia adalah satu-satunya alasan mengapa defendan berhenti menyerangnya. Walau bagaimanapun, sama ada atau tidak pukulan hanya berhenti selepas isteri plaintif campur tangan adalah sebenarnya bukan suatu isu. Isu sebenar adalah sama ada defendan menyerang plaintif dan menyebabkan kecederaan tersebut. Mahkamah tidak boleh terlalu mengambil berat tentang isu-isu yang remeh atau lebih buruk lagi, bukan isu (lihat perenggan 12).

(3) Bahkan, majistret juga tidak merujuk kepada keterangan perubatan, malah tidak menggunakannya. Ia jelas bahawa beliau lebih berminat dengan apa yang tidak ada di hadapan beliau daripada apa yang ada di hadapan beliau. Selain mendapati plaintif telah mengalami sedikit kecederaan, majistret yang bijaksana tidak membuat apa-apa penemuan

fakta yang lain. Jelas ia adalah tugasnya untuk mempertimbangkan secara kehakiman dan menilai semua keterangan yang relevan dan membuat penemuan selanjutnya. Kegagalan beliau berbuat demikian mewajarkan campur tangan mahkamah rayuan (lihat perenggan 18).

(4) Penipuan PW6 kepada pihak berkuasa imigresen di masa dahulu tidak relevan kepada isu-isu di hadapan majistret yang bijaksana. Walau bagaimanapun, tidak ada keterangan bahawa penipuan tersebut mempunyai kaitan dengan pekerjaannya dengan plaintif. Keterangan tersebut sepatutnya tidak diendahkan kerana tidak relevan dan kesan memudaratkan mengatasi nilai probatifnya (lihat perenggan 9).]

Notes

For a case on witness lied on some matters, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2833.

For cases on assault and battery, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 155–157.

For cases on corroboration, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2664–2671.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 172–189.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Browne v Dunn (1893) 6 R 67 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
New India Assurance Co Ltd v Shakuntalabai AIR 1987 MP 244 (refd)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Evidence Act 1950 s 134
Evidence Act [India] s 134

Rakhbir Singh (Rakhbir Singh & Co) for the appellant.
Pauline Sagau (Pauline Sagau & Associates) for the respondent.

Abdul Rahman Sebli JC:

[1] This was an action for damages against the respondent for assault and

battery. The learned magistrate after a full hearing dismissed the plaintiff's claim with costs. The appellant is dissatisfied with his decision, hence this appeal.

[2] Briefly the facts are as follows. The appellant ('the plaintiff') was a businessman who ran a coffee shop under the style and name of 'Kedai Kopi New Wah Hong' at U0091, Jalan Orang Kaya Kaya Awang Besar, WP Labuan. The respondent ('the defendant') was a taxi driver. On 3 May 2005 at about 12.30pm the plaintiff discovered that the tyre of his car which was parked behind his shop was punctured. The space where he parked his car was meant for taxis only but since he worked at the coffee shop he parked his car there. He asked his workers who punctured the tyre. Before his workers could answer the defendant walked towards him and shouted 'you talking about me?' in Mandarin. Apparently the defendant had taken offence to the question. Before the plaintiff could even react the defendant gave him a solid punch in the right eye causing him to fall to the ground. After he fell down the defendant continued to punch and kick him all over his body including his face and head. To a question what the defendant used to beat him up the complainant's answer was:

> For sure his hand, his fist and his legs. He was wearing shoes. He used the shoes to kick me. I saw him holding a stick when I got up. Apart from the stick, did not see anything else he was holding.

[3] According to the plaintiff on seeing that he was being beaten up by the defendant his wife came over and separated them. He said the beating was very painful and he thought his right eye ball had burst and had become blind. His wife rushed him to the police station which was 10 minutes away from the scene. He wanted to make a police report but was told by the police to go to the hospital first as his eye was bleeding. He was given a slip of paper to be handed to the hospital. His wife then took him to the Labuan hospital where he was admitted for two days. His police report was taken at the hospital. Photos were also taken of the injuries he sustained. According to the plaintiff his business was disrupted as he could not sell bakuteh for three days as a result of the injuries. He said his income from selling bakuteh was RM500 per day and after deducting expenses his net income was RM300 per day on average. He said only he knew the secret recipe of his bakuteh.

[4] In cross-examination the plaintiff admitted that he had parked his car at the taxi stand illegally. Asked if he knew who punctured the tyre of his car he said he had no idea. He testified that the stick the defendant was holding was a broom stick. He added that when he asked who punctured the tyre he was not directing the question to anyone in particular. Medical evidence was adduced through Dr Khalid Hussain Akhtar ('PW2'). He testified that in

May 2005 he was attached to the Labuan Hospital and did examine the plaintiff at the emergency department on 3 May 2005 at 3pm. He said the plaintiff was in pain, his right eye swelling and red and he could not see with that eye. PW2 added that the right eye vision was lost at that time and was considered a serious injury. He said by using the light-reaction test there was no reaction in the case of the plaintiff's right eye. His diagnosis was that there was blunt trauma to the face and dried right eye, bruises on parts of the body and lacerative wound on the left cheek. Asked what was the most probable cause of the trauma he said the likely cause was hand/fists. In re-examination he reaffirmed that the injuries were likely to have been caused by a blow from a fist. He added that the injuries were consistent with the plaintiff's complaint. Awang Besar bin Hussin ('PW5') was the medical assistant who attended to the plaintiff after he was referred to him by PW2. He described the condition of the plaintiff's right eye as follows:

> Tumpuan pada mata kanan. Kelopak mata bengkak, tunjang tebar merah, kornea 'cloudy'/tak clear, anak mata tiada reaksi pada cahaya.

[5] The photos ('P3 a-i') showing the injuries sustained by the plaintiff were produced through Constable Agus Salim bin Barli Pasdi ('PW3'). These photos show the condition of the plaintiff's right eye, face, arm and back as a result of the beating.

[6] The plaintiff called one of his workers to give evidence. She is Derma Arasun ('PW6'). She testified that at the time of the incident she had been working with the plaintiff for over two years. Her job was to attend to the customers and make coffee and to do some other work. When asked what food the coffee shop offered to the public PW6 answered:

> Mee goreng, bakuteh, nasi campur, macam-macam.

[7] PW6 said she saw the defendant assault her boss using a clenched fist. She confirmed that after the plaintiff fell down the defendant kicked him and poked his stomach with a stick. She did not remember the time but it was in the afternoon. The defendant's version of the incident was entirely different. He said that on 3 May 2005 at about 1pm the plaintiff tried to attack him by pointing his finger to his face and telling him he (plaintiff) wanted him dead ('Aku mau kau mati'). He added that when the plaintiff did that he pushed the plaintiff causing him to fall. However in the very next breadth he said the plaintiff fell by himself. He denied hitting the plaintiff. He said when the plaintiff got up he (plaintiff) took a mop stick and threatened to hit him with it, so he ran away. As he was running away he bumped into two policemen and both he and the plaintiff were told to go to the police station. He said there was no punch up between him and the plaintiff ('Tak ada

tumbuk-menumbuk'). Asked why he pushed the plaintiff he said this was because the plaintiff was pointing his finger too close to his face and he was afraid it could hurt his eye ('mungkin akan tercucuk mata saya'). In short the defendant's case is that it was the plaintiff who was the aggressor, not him. It was put to him in cross examination that he had a long standing grudge against the plaintiff as the latter always parked his car at the taxi stand. His answer was that he did not bother about it as the parking lot was government property ('kerajaan punya').

[8] In a brief judgment the learned magistrate ruled that the evidence adduced by the plaintiff was insufficient to establish his claim. It is clear that the reason why the learned magistrate dismissed the plaintiff's claim was because the plaintiff failed to call his wife to give evidence and because his worker ('PW6') in her testimony did not mention his wife's role in the incident. Perhaps it is useful to reproduce what the learned magistrate said, as follows:

> The guiding principle in determining the outcome of this case was on a balance of probabilities and it must follow the rule that he who asserts must prove. The plaintiff in his statement claimed that the only reason the beating ceased was because his wife stepped in and this stopped the defendant. However, the plaintiff never called his wife to corroborate this. He did not even introduce any evidence to say why his wife could not testify, if at all she was incapable. Furthermore, the plaintiff called one of his staff to corroborate the story and she completely failed to mention any part the wife played in the scuffle. A grave omission considering the role the wife played. Through cross examination, the defendants counsel was also able to get the staff to admit that she had lied to the Immigration Dept to secure employment. Under the circumstances that she had to corroborate her employer's story, it is the submission of the defence that she would lie to keep her job; a submission the court would agree is not far-fetched.

[9] Although he did not say so in so many words it is obvious that the learned magistrate drew adverse inference against the plaintiff for not calling his wife. Why, he even expected the plaintiff to explain why she could not testify if at all she was incapable. The issue before the court was simple and straightforward: was it more probable than not that the plaintiff had been assaulted by the defendant resulting in the injuries? Speaking for myself I would have thought that on a preponderance of probabilities a case of assault and battery had been made out by the plaintiff even without the evidence of his wife. The fact that the plaintiff sustained injuries during the incident is corroborated by medical evidence and his evidence that it was the defendant who caused them is corroborated by PW6. But the learned magistrate considered PW6's failure to mention anything about the role played by the plaintiff's wife as a 'grave omission'. This added to her admission in cross examination that she lied to the immigration authorities regarding her age in

the passport convinced the magistrate that she had lied to the court to keep her job. With due respect to the learned magistrate PW6's lie to the immigration authorities had no relevance to the issues before him. In any case there is no evidence that the lie had anything to do with her employment with the plaintiff. The evidence should have been disregarded for being irrelevant and whose prejudicial effect outweighed its probative value. I cannot see the logic behind the learned magistrate's reasoning that since PW6 lied to the immigration authorities she must have lied to the court. Surely the learned magistrate is not saying that anyone who had told lies out of court must not come to court to give evidence. Not even where a witness lies in court is there a hard and fast rule that the whole of his evidence must be rejected. In *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 Thompson LP laid down the rule as follows:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[10] In *New India Assurance Co Ltd v Shakuntalabai* AIR 1987 MP 244, TN Singh J said:

> A witness cannot be branded a liar and his evidence discarded on the sole ground that a part of his testimony was not reliable.

[11] PW6 may be an interested witness but that by itself is not a valid reason for doubting her credibility. As Ismail Khan J said in *Balasingham v Public Prosecutor* [1959] MLJ 193:

> There is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

[12] What the plaintiff's wife did during the incident had been explained by the plaintiff himself. Her role was merely to try to stop the assault and then to bring the plaintiff to the police station and the hospital. Why must the plaintiff's evidence on this point be corroborated by PW6 or other witnesses before his evidence can be accepted? As a matter of fact the learned magistrate misconstrued the plaintiff's evidence on this point. What the plaintiff said was that the defendant stopped beating him when his wife came in between them. The plaintiff did not say that was the only reason why the defendant stopped attacking him, as the learned magistrate seems to be suggesting. In any case whether or not the beating only stopped after the plaintiff's wife intervened is really a non issue. The real issue is whether the

defendant assaulted the plaintiff causing the injuries. The court must not be unduly concerned with trivial or worse, non issues. Strictly the law does not require a witness' evidence to be corroborated by other witnesses. This is manifested in s 134 of the Evidence Act 1950 ('the Act') which provides:

> No particular number of witnesses shall in any case be required for the proof of any fact.

[13] This section follows the maxim that evidence is to be weighed and not counted. In *Sarkar on Evidence* (14th Ed), the learned authors in their commentary on s 134 of the Indian Evidence Act which is in pari materia with s 134 of the Act have the following to say, amongst others:

> Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the testimony of the single witness itself requires as a rule of prudence that corroboration should be insisted upon, for example in the case of a child witness, or of an accomplice or of an analogous character.

[14] The plaintiff is neither a child nor a person of analogous character. It was therefore wrong for the learned magistrate to insist on corroboration. If at all corroboration is required it can be found in the medical evidence and the testimony of PW6.

[15] The plaintiff was subjected to lengthy cross-examination by learned counsel for the defendant. The questions asked ranged from how many friends he had to how much income tax he paid in 2005. But at no time did learned counsel put to him the defendant's version of the incident, which was diametrically opposed to the plaintiff's version. The plaintiff's evidence that his wife tried to stop the beating was also not challenged in cross-examination. The same goes with PW6's evidence that the plaintiff was punched in the face and continued to be assaulted after he fell down. These evidence are not inherently incredible. By not challenging them the defence are deemed to accept them: *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; see also *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 where Shankar J (as he then was) said:

> Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales. The plaintiff had produced no evidence whatsoever.

[16] Failure to put the defendant's case to the plaintiff in cross examination may be treated as an abandonment of the defendant's pleaded case. In *Browne v Dunn* (1893) 6 R 67 the court explained thus:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[17] Mukharji J spoke in similar vein in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 when he said:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in it's entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[18] The learned magistrate's failure to consider the evidence before him is a serious omission. He did not even refer to the medical evidence, let alone deal with it. It appears that he was more interested in what was not before him than what was before him. Other than finding that the plaintiff did suffer some injuries the learned magistrate did not make any other finding of fact. Clearly it was his duty to judicially consider and evaluate all the relevant evidence and make his findings thereon. His failure to do so warrants appellate intervention. *In Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 the Court of Appeal said:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it

against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[19] It is clear to me that the learned magistrate was plainly wrong in arriving at his decision. He had not only failed to give the plaintiff's evidence the due consideration it deserved but had also failed to direct his mind to the relevant principles. Had he done so he would have come to the conclusion that the plaintiff had established his case on a balance of probabilities. This is therefore a fit and proper case for this court to interfere with his findings. To allow the judgment to stand would be to perpetuate an injustice to the victim of a viscious attack. The appeal was therefore allowed with costs.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed